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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 31 and 52**

**[FAC 2005-68; FAR Case 2012-017; Docket 2012-0017,  
Sequence 1]**

**RIN 9000-AM38**

**Federal Acquisition Regulation; Expansion of  
Applicability of the Senior Executive Compensation  
Benchmark**

**AGENCY:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Interim rule.

**SUMMARY:** DoD, GSA, and NASA are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 803 of the National Defense Authorization Act for Fiscal Year 2012. In accordance with section 803, the interim rule expands the application to a broader group of contractor employees on contracts awarded by DoD, NASA, and the Coast Guard of the senior executive compensation benchmark amount which limits the reimbursement of compensation costs. This interim rule applies section 803 prospectively to contracts awarded on or after (but not

before) the date of enactment of section 803 (which was December 31, 2011), to the contractor compensation costs incurred after January 1, 2012. In addition, also as part of the implementation in the FAR of section 803, DoD, GSA and NASA are separately issuing a proposed rule (FAR Case 2012-025) that addresses the retroactive application of section 803 to contractor compensation costs incurred after January 1, 2012, under contracts that had been awarded before December 31, 2011.

**DATES:** Effective Date: [INSERT DATE OF PUBLICATION IN THE **FEDERAL REGISTER.**]

Comment Date: Interested parties should submit written comments to the Regulatory Secretariat on or before [insert date 60 days after **FEDERAL REGISTER** publication date] to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005-68, FAR Case 2012-017, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2012-017". Select the link "Submit a Comment" that corresponds with "FAR Case 2012-017."

Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2012-017" on your attached document.

- Fax: 202-501-4067.

- Mail: General Services Administration,  
Regulatory Secretariat (MVCB), ATTN: Hada  
Flowers, 1800 F Street, NW., 2nd Floor,  
Washington, DC 20405.

Instructions: Please submit comments only and cite FAC 2005-68, FAR Case 2012-017, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward N. Chambers, Procurement Analyst, at 202-501-3221, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAC 2005-68, FAR Case 2012-017.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

The National Defense Authorization Act for Fiscal Year 2012 (Pub. L. 112-81) was signed into law and effective on December 31, 2011. Section 803 of the law amended the standards for determining the individuals affected by the senior executive compensation benchmark amount.

Specifically, section 803 expanded the applicability (reach) of the existing executive compensation cap so that in the case of DoD, NASA, and Coast Guard contracts the compensation cap would apply to all employees of a

contractor (instead of just the "five most highly compensated" employees in management positions at each home office and each segment of the contractor).

In section 803(c)(2), Congress stated that the expanded reach of the compensation cap "shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into before, on, or after the date of the enactment of this Act" (which was December 31, 2011). In addition, Congress in section 803(c)(1) stated that the amendments in section 803 shall be implemented in the FAR. In accordance with section 803(c)(1), DoD, GSA, and NASA are implementing section 803 in the FAR through the issuance of this interim rule and a separate proposed rule.

This interim rule amends FAR 31.205-6(p) to require that the incurred compensation costs for all contractor employees on all DoD, NASA, and Coast Guard contracts awarded on or after December 31, 2011, be subject to the senior executive compensation amount. The reference to 31.205-6(p) in FAR 52.216-7 is also updated to reflect this revision in 31.205-6(p).

DoD will separately handle the implementation of authority provided by 10 U.S.C. 2324(e)(1)(P), as amended by section 803(a), in which Congress has authorized the Secretary of Defense to establish "one or more narrowly targeted exceptions for scientists and engineers upon a

determination that such exceptions are needed to ensure that the Department of Defense has continued access to needed skills and capabilities."

As noted above, section 803(c)(2) states that the amendments made by section 803 "shall apply with respect to costs of compensation incurred after January 1, 2012, under contracts entered into before, on, or after the date of the enactment of this Act," which was December 31, 2011. There are challenges with respect to the retroactive application of section 803 (i.e., to the application of section 803 to contracts awarded before the enactment of section 803). The implementation of section 803 is similar to the implementation of section 808 of the National Defense Authorization Act for Fiscal Year 1998 (Pub. L. 105-85, November 18, 1997), which imposed a cap on Government contractor's allowable costs of "senior executive" compensation. Section 808, like section 803, retroactively applied to contracts that already existed on the date of its enactment; both statutes contain text which applied the statute to contracts awarded before, on, or after the date of enactment of the underlying act. In litigation on the application of section 808 to contracts awarded before the date of the enactment of the statute, the courts held that section 808 breached contracts awarded before the statutory date of enactment (General Dynamics Corp. v. U.S., 47 Fed.

Cl. 514 (2000); and ATK Launch Systems, Inc., ASBCA 55395, 2009-1 BCA ¶ 34118 (2009)).

For these reasons, DoD, GSA, and NASA are implementing section 803 with both an interim rule and a proposed rule. This interim rule addresses only the prospective application of section 803, i.e., to contracts awarded on or after its enactment (December 31, 2011). The separate proposed rule (FAR Case 2012-025) addresses the retroactive application of section 803 to contracts that had been awarded before its enactment. In other words, under this bifurcated approach, DoD, GSA, and NASA are implementing section 803 through this interim rule for contracts awarded on or after the date of enactment (December 31, 2011) and, at the same time, DoD, GSA, and NASA are addressing in the proposed rule the retroactive application of section 803. DoD, GSA, and NASA seek public comments on both the interim and proposed rules (and, on the proposed rule, especially with respect to the potential complexities associated with applying section 803 to contracts that had been awarded before the date of its enactment).

## **II. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to

select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

### **III. Regulatory Flexibility Act**

DoD, GSA, and NASA do not expect this interim rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq. However, an initial regulatory flexibility analysis (IRFA) has been prepared consistent with 5 U.S.C. 603, and is summarized as follows:

An analysis of data in the Federal Procurement Data System (FPDS) revealed that most contracts awarded to small entities use simplified acquisition procedures or are awarded on a competitive, fixed-price basis, and do not require application of the cost principle contained in this rule. Furthermore, it is not expected that a substantial number of small entities will have any employees, other than possibly among the "five most highly compensated" management employees at each home office and each segment of the contractor, whose compensation costs exceed the executive compensation benchmark. The current benchmark amount is \$763,029, for costs incurred after January 1, 2011 (77 FR 24226, April 23, 2012). However, at this time an estimate of the number of small entities whose reimbursement for the compensation costs of their contractor employees will be limited by this rule is not available.

The interim rule imposes no reporting, recordkeeping, or other information collection requirements. The rule does not duplicate, overlap, or conflict with any other Federal rules, and there are no known significant alternatives to the rule.

The Regulatory Secretariat has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAC 2005-68, FAR Case 2012-017) in correspondence.

#### **IV. Paperwork Reduction Act**

The interim rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).



## **V. Determination to Issue an Interim Rule**

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because section 803 of Pub. L. 112-81, signed into law on December 31, 2011, required it to be implemented in the FAR within 180 days of enactment. This statute expands the existing executive compensation cap so that it would apply to all employees of a contractor instead of just the "five most highly compensated" management employees at each home office and each segment of the contractor for DoD, NASA, and Coast Guard contracts. Therefore, issuing an interim rule that is effective upon publication, prior to the receipt of public comment will allow agencies to immediately implement the requirements of this law. Pursuant to 41 U.S.C. 1707 and FAR 1.501-3(b), DoD, GSA, and NASA will consider public comments received in response to this interim rule in the formation of the final rule.

**List of Subjects in 48 CFR Parts 31 and 52**

Government procurement.

Dated: June 10, 2013

Laura Auletta,  
Director,  
Office of Governmentwide  
Acquisition Policy,  
Office of Acquisition Policy,  
Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 31 and 52 as set forth below:

1. The authority citation for 48 CFR parts 31 and 52 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20115.

**PART 31—CONTRACT COST PRINCIPLES AND PROCEDURES**

2. Amend section 31.205-6 by revising paragraph (p) to read as follows:

**31.205-6 Compensation for personal services.**

\* \* \* \* \*

(p) Limitation on allowability of compensation for certain contractor personnel. (1) Senior executive compensation limit. (i) Applicability. This paragraph (p)(1) applies to the following:

(A) To all executive agencies, other than DoD, NASA and the Coast Guard, for contracts awarded before, on, or after December 31, 2011;

(B) To DoD, NASA, and the Coast Guard for contracts awarded before December 31, 2011;

(ii) Costs incurred after January 1, 1998. For costs incurred after January 1, 1998, for the compensation of a senior executive in excess of the benchmark compensation amount determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy

(OFPP), under 41 U.S.C. 1127 are unallowable (10 U.S.C. 2324(e)(1)(P) and 41 U.S.C. 4304(a)(16)). This limitation is the sole statutory limitation on allowable senior executive compensation costs incurred after January 1, 1998, under new or previously existing contracts. This limitation applies whether or not the affected contracts were previously subject to a statutory limitation on such costs. (Note that pursuant to section 804 of Pub. L. 105-261, the definition of "senior executive" in (p)(3) has been changed for compensation costs incurred after January 1, 1999.)

(2) All employee compensation limit. (i) Applicability. This paragraph (p)(2) applies to DOD, NASA, and the Coast Guard for contracts awarded on or after December 31, 2011;

(ii) Costs incurred after January 1, 1998. For costs incurred after January 1, 1998, for the compensation of any contractor employee in excess of the benchmark compensation amount, determined applicable for the contractor fiscal year by the Administrator, Office of Federal Procurement Policy (OFPP) under 41 U.S.C. 1127 are unallowable (10 U.S.C. 2324(e)(1)(P)).

(3) Definitions. As used in this paragraph (p)–

(i) Compensation means the total amount of wages, salary, bonuses, deferred compensation (see paragraph (k) of this subsection), and employer contributions to defined contribution pension plans (see paragraphs (j)(4) and (q) of

this subsection), for the fiscal year, whether paid, earned, or otherwise accruing, as recorded in the contractor's cost accounting records for the fiscal year.

(ii) Senior executive means—

(A) Prior to January 2, 1999—

(1) The Chief Executive Officer (CEO) or any individual acting in a similar capacity at the contractor's headquarters;

(2) The four most highly compensated employees in management positions at the contractor's headquarters, other than the CEO; and

(3) If the contractor has intermediate home offices or segments that report directly to the contractor's headquarters, the five most highly compensated employees in management positions at each such intermediate home office or segment.

(B) Effective January 2, 1999, the five most highly compensated employees in management positions at each home office and each segment of the contractor, whether or not the home office or segment reports directly to the contractor's headquarters.

(iii) Fiscal year means the fiscal year established by the contractor for accounting purposes.

(iv) Contractor's headquarters means the highest organizational level from which executive compensation costs are allocated to Government contracts.

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

3. Amend section 52.216-7 by revising the date of the clause and paragraph (d)(2)(iv)(B) to read as follows.

**52.216-7 Allowable Cost and Payment.**

\* \* \* \* \*

ALLOWABLE COST AND PAYMENT ( [**INSERT Abbreviated month and year of DATE OF PURCHASE**  
**REGISTER**] )

(d) \* \* \*

(2) \* \* \*

(iv) \* \* \*

(B) General organizational information and limitation on allowability of compensation for certain contractor personnel. See 31.205-6(p). Additional salary reference information is available at [http://www.whitehouse.gov/omb/procurement\\_index\\_exec\\_comp/](http://www.whitehouse.gov/omb/procurement_index_exec_comp/).

\* \* \* \* \*

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